(2)

Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1998

Rose Marie Davison, Taxpayer # 039-18-4698;
Riley Sean Davison, Petitioner's Assistant,
PETITIONER,
v.
United States; Internal Revenue Service,
RESPONDENT.

On Petition for Writ of Certiorari
To The United States District Court
Western District of Texas, San Antonio Division

Mandate: United States Court of Appeals for the Fifth Circuit
ORIGINALLY FILED IN ACCORDANCE WITH RULE 11

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*

AMENDED APPENDIX OF JUDICIAL AND ADMINISTRATIVE RENDERINGS

Rose Marie Davison, Petitioner Pro Se
8540 Michelle Way
San Antonio, TX
78239
(210)590-6419

/Riley Davison, assist
6435 David Dr.
San Antonio, TX
78239-2718
210/654-8043

3298

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Statutes and Rules	Pages:
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* 28 U.S.C. 636...:	1,2,4,8,11,12
* Arbitration Act, Federal Arbitration Act, FAA	4,6,7
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Federal Cases **Pages:**

* Hishon, 467 U.S. at 73, 104 S.Ct. at 2232: 6
* Kaiser Aluminum and Chemical Sales, Inc. v. Avondale, 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105, 103 S.Ct. 729 (1982): 6
* Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc., 864 F.Supp. 14, 15 (W.D. Tx 1993), affirmed, 30 F.3d 627, 629 (5th Cir. 1994): 6
* Fernandez-Montez v. Allied Pilots Assoc., 987 F.2d 278 (5th Cir. 1993): 6
* Baton Rouge Bldg. and Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879,881 (5th Cir. 1986): 6
* O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985): 6
* Neitzke v. Williams, 490 U.S. 319, 327 (1989): 6
* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25n. 32 (1983); 460 U.S. at 25n.32, 103 S.Ct. at 942 n.32: 6,7
* Zimmerman v. International Companies and Consulting Inc., 107 F.3d 344, 346 (5th Cir. 1997): 7
* Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir. 1986): 7
* Thomas v. Arn, 474 U.S. 140, 150; 106 S.Ct. 466, 472; 88 L.Ed. 2d 435 (1985): 9
* Douglass v. United States Automobile Ass'n, 79 F.3d 1415, 1428 (5th Cir. 1996): 9
* United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989): 11
* Battle v. Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987) 11
* General Motors Corp. v. Pamela Equities Corp. (5th Cir. 97-30185) July 9, 1998: 29
* Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984): 29
* Mar-len of La., Inc. v. Parsons-Gilbane, 773 F.2d 633, 635-636 (5th Cir. 1985): 29
* Warrior & Gulf, 363 U.S. at 583: 29
* Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979): 29

1* FILED JUN 22 1998 CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS BY s/"*DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON, Taxpayer # 039-18-4698,
Plaintiff,

vs.

U.S.A./On Behalf of its Agent, the Internal Revenue Service,
Defendant.

CIVIL ACTION NO. SA-98-CA-516-FB

Date of Entry: June 23, 1998

(Docket no. 2; Pages 4-6 Original Record.)

REFERRAL ORDER

In accordance with the authority vested in the United States Magistrate Judge pursuant to Local Rule CV-72 and Appendix C, Local Rules for the Assignment of Duties to United States Magistrates, and 28 U.S.C. 636(b), the instant action is hereby REFERRED to a randomly assigned United States Magistrate Judge for disposition of all pretrial matters.

I. MATTERS REFERRED

This reference confers the following duties upon the Magistrate Judge to whom the case is assigned, the parties and their counsel:

(1) The Magistrate Judge shall issue an order requesting scheduling recommendations from the parties. Upon receipt of the parties' recommendations, the Magistrate Judge shall issue a scheduling order and order concerning pretrial matters in accordance with the established practice of the undersigned. The Magistrate Judge has discretion to extend or otherwise modify deadlines in the scheduling order upon a showing of good cause; however, once the Magistrate Judge has ruled on any matter, objections to and/or appeals from the Magistrate Judge's rulings shall not be considered good cause for the extension of any deadline.

(2) The parties have a right to consent to proceed before the Magistrate Judge. Pursuant to the Scheduling Order, the parties shall then indicate to the district clerk in writing whether they are

willing to consent to trial before the Magistrate Judge. 28 U.S.C. 636 (c) (2).

(3) The Magistrate Judge shall rule on all pretrial motions, pursuant to 28 U.S.C. 636 (b) (1) (A). Where the Magistrate Judge's authority to make rulings is limited by statute, a recommendation to this Court shall be made in lieu of an order, pursuant to 28 U.S.C. 636 (b) (1) (B) and (C); unless all parties consent that the Magistrate Judge may rule on such otherwise exempt matters, pursuant to 28 U.S.C. 636 (c) (1).

(4) Unless the parties have consented to proceed before the Magistrate Judge in accordance with Paragraph (2), supra, the Magistrate Judge shall return the case to this Court upon the submission of the proposed pretrial order and the ruling and/or filing of recommendations on all pretrial motions pending at the time the pretrial order is submitted.

II. MATTERS NOT REFERRED

This reference includes any pretrial matter not specifically mentioned above; however, this reference does not include the following:

(1) Motions for Temporary Restraining Orders and Preliminary Injunctions. This Court shall retain all motions for preliminary relief under Federal Rule of Civil Procedure 65. Such motions should be presented to this Court for disposition. Should the parties consent to hearing before the magistrate or should the Court find such hearing proper, Rule 65 motions shall be referred by separate order of this Court to the magistrate presiding over the other matters in the case.

(2) Settlement Agreements. Should the parties reach a settlement of this case, they should contact the chambers of the undersigned judge in writing or telephonically. Upon being informed of a settlement, this Court will enter such orders as it finds proper to resolve the case.

III. OBJECTIONS AND APPEALS

Appeals from the Magistrate Judge's orders and objections to the Magistrate Judge's recommendations shall be made in compliance with 28 U.S.C. 636 (b) (1), Rule 72 of the Federal Rules of Civil Procedure, and Rule 4 of Appendix C to the Local Rules. Such objections and appeals shall be limited to issues first

raised before the Magistrate Judge; failure to bring any defect in any order or recommendation to the attention of the Magistrate Judge prior to raising the issue before this Court shall be deemed a waiver of issue.

ORDERED, SIGNED and ENTERED THIS *21st* DAY OF June, 1998.

s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

FILED DEC 22 1998 CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS BY s/"DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON,
Plaintiff
v.
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.
CIVIL ACTION NO. SA-98-CA-516-FB
Date of Entry: December 23, 1998
(Docket no. 13; Page 92 Original Record.)

ORDER

All matters for which this cause was referred to the undersigned Magistrate Judge having been disposed of,

It is hereby **ORDERED** that this cause is returned to the District Court for all purposes.

SIGNED and ENTERED this *22* day of December, 1998.

s/ Pamela Mathy
Pamela A. Mathy
UNITED STATES MAGISTRATE JUDGE

FILED DEC 22 1998 CLERK, U.S. DISTRICT COURT *4
WESTERN DISTRICT OF TEXAS BY s/ ""DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON,
Plaintiff,
V.
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.
CIVIL ACTION NO. SA-98-CA-516-FB
Date of Entry: December 23, 1998
(Docket no. 12; Pages 86-91 Original Record.)

MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: Honorable Fred Biery
United States District Judge

Pursuant to the order of referral in the above-styled and numbered cause of action to the undersigned United States Magistrate Judge and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C. 636(b)(1)(B) and rule 1(d) of the Local Rules for the Assignment of Duties to United States Magistrates, effective January 1, 1994, in the Western District of Texas, the following report is submitted for your review and consideration.

1. PROCEDURAL HISTORY AND FACTS

On June 12, 1998, plaintiff filed a notice of petition to compel arbitration ("petition")(docket no. 1). In the petition, plaintiff asks the court to appoint an arbitrator and compel the United States to participate in arbitration with plaintiff pursuant to the Arbitration Act. Plaintiff seeks compensation "for harm done for numerous violations of the Internal Revenue Code, in conjunction with the Bankruptcy Code, and the continual deprivation of Constitutional

Rights and guarantees" (docket no. 1 at 1). Thereafter, plaintiff filed a motion for judicial review and oversight (docket no. 7) and two motions to compel arbitration (docket nos. 8 and 10). In the motion for judicial review, plaintiff, inter alia, objected to Magistrate Court jurisdiction (docket no. 7 at 1-2), noted that "an original complaint and petition to compel arbitration had not been filed" (docket no. 7 at 3), referenced that "wrongful federal tax liens were not lifted until November of 1997" (docket no. 7 at 4) and acknowledged that plaintiff's bankruptcy attorney had forfeited rights to all refunds on June 13, 1996 (docket no. 7 at 4). This pleading thus indicates that plaintiff wishes to have her right to a refund arbitrated (docket no. 7 at 2-5). In the motions to compel arbitration, plaintiff stated that she was then filing an original complaint (docket no. 8 at 3) apparently seeking to arbitrate the seizure of plaintiff's sole bank account "without prior assessment" in March 1984 (docket no. 8 at 4). The United States filed a motion to dismiss plaintiff petition to compel arbitration on the ground that the court lacks subject matter jurisdiction or, in the alternative, that the petition fails to state a claim upon which relief can be granted under Rule 129b)(6), Fed.R.Civ.P. (docket no. 9). Plaintiff filed a response to the motion to dismiss (docket no. 11).

II. ISSUES

1. Does this Court have subject matter jurisdiction to consider plaintiff's request?
2. Does plaintiff's complaint state a claim upon which relief can be granted?

III. RULE 12(b)(6) STANDARD

Under Rule 12(b)(6), Fed.R.Civ.P., plaintiff must state a claim upon which relief can be granted or the complaint may be dismissed with prejudice as a matter of law. A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted."[1] When considering a motion to dismiss for failure to state a claim, "all factual allegations in the complaint must be

taken as true and construed favorably to the plaintiff."[2] The United States Supreme Court has elaborated:

> Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be proved consistent with the allegations," Hishon, supra, 467 U.S. at 73, 104 S.Ct. at 2232, a *claim must be dismissed,* without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.[3]

When a lawsuit is filed by a pro se plaintiff, the Court is required to show deference and conduct a thorough review to determine if plaintiff has stated any legitimate claim for relief.

IV. ARGUMENTS AND CONCLUSIONS OF LAW

The Federal Arbitration Act "does not create any independent federal jurisdiction under 28 U.S.C. 1331." Moses H. Cone

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[1] Kaiser Aluminum and Chemical Sales, Inc. v. Avondale, 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105, 103 S.Ct. 729 (1982), quoted in Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc., 864 F.Supp. 14, 15 (W.D.Tx 1993), affirmed, 30 F.3d 627 (5th Cir. 1994).

[2] Fernandez-Montez v. Allied Pilots Assoc., 987 F.2d 278 (5th Cir. 1993). See also Capital Parks, Inc., 30 F.3d at 629 ("A court's decision to dismiss for failure to state a claim may be upheld 'only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.' Baton Rouge Bldg. and Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986).") See also O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985).

[3] Neitzke v. Williams, 490 U.S. 319, 327 (1989).

Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25n. 32 (1983):

> "A suit to compel arbitration under the FAA may therefore be brought in federal district court "only when the court would have jurisdiction over a suit on the underlying dispute; hence there must be diversity of citizenship or some other independent basis of federal jurisdiction before the order can issue." Moses H. Cone Memorial Hospital, 460 U.S. at 25 n.32, 103 S.Ct. at 942 n.32.

Even under the most liberal construction of plaintiff's complaint, plaintiff's petition does not allege any independent basis for invoking the jurisdiction of the court.[4] Accordingly, the complaint should be dismissed for lack of federal jurisdiction.

Plaintiff has not alleged and defendant denies that there is an agreement between the United States Internal Revenue Service and plaintiff to arbitrate any matter (docket no. 9 at 3). The FAA does not require "arbitration for parties who have not contractually bound themselves to arbitrate their disputes. The FAA does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration." Zimmerman v. International Companies and Consulting Inc., 107 F.3d 344, 346 (5th Cir. 1997). Plaintiff's response and objection to defendant's motion to dismiss argues that specific performance of an arbitration contract may be ordered (docket no. 11 at 21) but plaintiff does not demonstrate that plaintiff has such an arbitration contract with the IRS. Attachments to plaintiff's response and objection show that plaintiff was in bankruptcy court in a case filed in 1994 and that on June 13, 1996 Judge King, inter alia, ordered that plaintiff, as debtor, had no claim for income tax refunds for 1980, 1981 and

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[4] The Court liberally has construed plaintiff's petition to include the motion for judicial review and the two motions to compel arbitration and liberally has construed both documents in plaintiff's favor. Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir. 1986).

1982 because the claims were time-barred and that IRS had an unsecured priority claim and an unsecured general claim for other tax years' refunds, as noted in the order. To the extent that plaintiff is wishing to seek review in this Court of the June 13, 1996 order of Judge King, that review is time-barred, even if otherwise procedurally proper. Accordingly, plaintiff has failed to state a claim upon which relief can be granted.

V. RECOMMENDATION

The Court recommends that defendant's motion to dismiss plaintiff's notice of petition to compel arbitration (docket no. 9) be **GRANTED** on the ground that plaintiff has failed to allege subject matter jurisdiction in this Court and has failed to state a claim upon which relief can be granted. The Court also recommends that plaintiff's motion for judicial review (docket no. 7) and motions to compel arbitration (docket nos. 8 and 10) be **DENIED.**

VI. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Report and Recommendation on each and every party either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. According to Title 28 U.S.C. 636(b)(1) and Rule 72(b), Fed.R.C.V..P., any party who desires to object to this report must serve and file written objections to the Report and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the Clerk of the Court, and serve the objections on all other parties and the Magistrate Judge.** A party's failure to file written objections to the proposed findings, conclusions and recommendations

contained in this report shall bar the party from a de novo determination by the District Court.[5] Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court.[6]

SIGNED and ENTERED this 22 day of December, 1998.

s/ *Pamela Mathy*
PAMELA A. MATHY
United States Magistrate Judge

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[5] See Thomas v. Arn, 474 U.S. 140, 150; 106 S.Ct. 466, 472; 88 L.Ed.2d 435 (1985).

[6] Douglass v. United Services Automobile Ass'n., 79 F.3d 1415, 1428 (5th Cir. 1996).

FILED JAN 20 1999 CLERK, U.S. DISTRICT COURT *10
WESTERN DISTRICT OF TEXAS BY s/"DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON,
Plaintiff
vs.
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.
CIVIL ACTION NO. SA-98-CA-516-FB
Date of Entry: Filed January 20, 1999
(Docket no. 16; Page 145 Original Record.)

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause. Pursuant to the Order Accepting Memorandum and Recommendation of the United States Magistrate Judge entered this date.

IT IS ORDERED, ADJUDGED AND DECREED that defendant's motion to dismiss plaintiff's notice of petition to compel arbitration (docket no. 9) is GRANTED on the ground that plaintiff has failed to allege subject matter jurisdiction in this Court and has failed to state a claim upon which relief can be granted. Plaintiff's motion for judicial review (docket no. 7) and motions to compel arbitration (docket nos. 8 & 10) are DENIED. Each party is to bear its respective costs. Motions pending with the Court, if any, are denied.

ORDERED, SIGNED and ENTERED this *20=* day of January, 1999.

s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

11* FILED JAN 20 1999 CLERK, U.S. DISTRICT CO/
WESTERN DISTRICT OF TE/ BY s/"DEPUTY CLE/

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.
CIVIL ACTION NO. SA-98-CA-516-FB
Date of Entry: Filed January 20, 1999
(Docket No. 15; Pages 143-144 Original Record.)

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before this Court is the Memorandum and Recommendation of the United States Magistrate Judge (docket no. 12) and plaintiff's written objections thereto (docket no. 14).

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of the Memorandum and Recommendation. See 28 U.S.C. 636 (b) (1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Memorandum and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed the plaintiff's submission in light of the entire record. As required by Title 28 U.S.C. 636 (b) (1) (c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiff's objections lack merit.

Accordingly, it is ORDERED the United States Magistrate Judge's Memorandum and Recommendation filed in this cause is ACCEPTED pursuant to 28 U.S.C. 636 (b) (1) such that defendant's motion to dismiss plaintiff's notice of petition to compel arbitration (docket no. 9) is GRANTED on the ground that plaintiff has failed to allege subject matter jurisdiction in this Court and has failed to state a claim upon which relief can be granted. Plaintiff's motion for judicial review (docket no. 7) and motions to compel arbitration (docket nos. 8 and 10) are DENIED. Each party is to bear its respective costs. Motions pending with the Court, if any, are denied.

ORDERED, SIGNED and ENTERED this *20=* day of January, 1999.

s/ *Fred Biery*
FRED BIERY
UNITED STATES DISTRICT JUDGE

13* FILED FEB 18 1999 CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS BY s/"DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

ROSE MARIE DAVISON,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.
CIVIL ACTION NO. SA-98-CA-516-FB
Date of Entry: February 19, 1999
(Docket No. 21; Page 253 Original Record.)

ORDER

Before the Court are Plaintiff Pro Se's Formal Application Under Title 9 United States Code Section 3 (docket no. 18) and plaintiff's Motion to Alter or Amend Judgment (docket no. 20).[1] After careful consideration, the Court is of the opinion the motions should be denied.

IT IS THEREFORE ORDERED that Plaintiff Pro Se's Formal Application Under Title 9 United States Code Section 3 (docket no. 18) and plaintiff's Motion to Alter or Amend Judgment (docket no. 20) are DENIED.

ORDERED, SIGNED and ENTERED this *18=* day of February, 1999.

s/ *Fred Biery*
FRED BIERY
UNITED STATES DISTRICT JUDGE

U.S. COURT OF APPEALS FILED APR 22 1999 *14
CHARLES R. FULBRUGE III CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50146

ROSE MARIE DAVISON
Petitioner-Appellant
and
RILEY SEAN DAVISON
Appellant

v.

UNITED STATES OF AMERICA,
Internal Revenue Service
Respondent-Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio
(MOT-21 - U.S. COURT OF APPEALS: Filed APR 22 1999;
CHARLES R. FULBRUGE III, CLERK (CA5 Docket))

ORDER:
IT IS ORDERED that the motion of appellant Rose Marie Davison to stay case pending Petition for Writ of Certiorari to the Supreme Court of the United States is *denied*

s/ *Edith H. Jones*
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

15* *UNITED STATES COURT OF APPEALS*

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

MAY 3, 1999

Mr. WILLIAM PUTNICKI, CLERK
WESTERN DISTRICT OF TEXAS, SAN ANTONIO
UNITED STATES DISTRICT COURT
655 EAST DURANGO BLVD.
US COURTHOUSE
SAN ANTONIO, TX 78206

No. 99-50146 DAVISON v. U.S.A.
USDC No. SA-98-CV-516
SA-98-CV-516

Enclosed is a certified copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:
(1) Volume (1) Supplemental Volume

Sincerely,
CHARLES R. FULBRUGE III, CLERK
By: s/ *Sherry Towle*
Sherry Towle, Deputy Clerk

/ swt

cc: (letter only)
Ms Rose Marie Davison
Mr Riley Sean Davison
Mr Murray S Horwitz
Ms Regina Sherry Moriarty

MDT-1

U.S. COURT OF APPEALS **F I L E D** MAY - 3 1999 *16
CHARLES R. FULBRUGE III CLERK

FILED MAY 7 1999 CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS BY s/"DEPUTY CLERK
(Docket No. 23: Filed 5/7/99; Mandate filed 5/3/99)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 99-50146 *SA98CA516FB*

ROSE MARIE DAVISON Petitioner-Appellant
and RILEY SEAN DAVISON Appellant
v.
UNITED STATES OF AMERICA, Internal Revenue Service
Respondent-Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

CLERK'S OFFICE:

Under 5th CIR. R. 42.3, the appeal is dismissed for want of prosecution for failure of the appellants to file their brief and record excerpts within the time fixed by the rules, this date, May 3, 1999.

CHARLES R. FULBRUGE III
Clerk of the United States Court
of Appeals for the Fifth Circuit
/swt By: s/ *Sherry Towle*
Sherry Towle, Deputy Clerk
FOR THE COURT - BY DIRECTION

DIS-2

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By s/ *Sherry Towle*
Deputy MAY - 3 1999
New Orleans, Louisiana

17*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

IN RE: ROSE DAVISON, DEBTOR
CASE NO. 94-53421-K, CHAPTER 13

FILED APR 13, 1995 (Docket No. 7 - 1)
(Order to Sell: Filed March 27, 1995, Docket No. 5 - 1)
U.S. BANKRUPTCY COURT BY s/*"BC"* DEPUTY

ADDENDUM TO CONFIRMATION ORDER

The following Addendum to the Confirmation Order on the above styled and numbered cause concerns the house and property located at 6435 David Dr., San Antonio, Texas and feasibility of the Debtor's Plan.

Debtor has filed a Motion to Sell Property of the Estate on the real property at 6435 David Dr., San Antonio, Texas. The proceeds from the sale of that property will be paid by the bank directly to the Internal Revenue Service. The I.R.S. will then need to file an amended claim in this case.

After the new claim is filed, the case will be reviewed for feasibility. If the Plan is still infeasible, the Debtor will then raise her payment to make the Plan feasible.

Signed ====== this ====== **APR 13 1995,** 1995.

s/ " ? "
HONORABLE RONALD B. KING
PRESIDING BANKRUPTCY JUDGE

Approved:

s/ *John C. Connors*
JOHN C. CONNORS
ATTORNEY FOR DEBTORS

s/ *Marion A. Olson Jr*
MARION A. OLSON, JR.
CHAPTER 13 TRUSTEE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

IN RE ROSE DAVISON DEBTOR
CASE NO. 94-53421K, CHAPTER 13

O R I G I N A L FILED APR 26 1995 (Docket No. 8 - 1)
U.S. BANKRUPTCY COURT BY s/*"BC"* DEPUTY

ORDER TO SELL PROPERTY OF THE ESTATE

ON THIS day came on to be considered the Debtor's Motion to Sell Property of the Estate in the above-styled and numbered case.

It appearing to the Court that no written objection to this Motion having been made by any party in interest within twenty (20) days from the Certificate of Service thereof;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Sell Property of the Estate (the property located at 8540 Michelle Way, San Antonio, Texas 78239) be granted based upon the Chapter 13 Trustee's recommendation and that the proceeds be paid directly to.

Signed this *25* day of *April*, 1995.

s/ *Ronald B. King*
UNITED STATES BANKRUPTCY JUDGE

19*

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

IN RE: Davison, Rose, DEBTOR(S)
CASE NO. 94-53421K, CHAPTER 13 PROCEEDING

FILED: MAR 05 1996 (Docket No. 12 - 1)
U.S. BANKRUPTCY COURT BY s/ *"BC"* DEPUTY

OBJECTION TO PROOF OF CLAIM

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN REQUEST FOR HEARING IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT WITHIN SIXTY (60) DAYS FROM THE DATE OF SERVICE HEREOF, UNLESS THE COURT UPON TIMELY APPLICATION SHORTENS OR EXTENDS THE TIME FOR FILING SUCH REQUEST FOR HEARING.

The above named debtor objects to the allowance of the claim of the Internal Revenue Service in the amount of $26,489.57 for 1980-1982 income taxes according to the Proof of Claim herein on the following grounds:

I. The creditor has failed to amend their claim to coincide with the Debtors amended returns for the years 1980-1982.

II. Further, the debtors request the Internal Revenue Service amend their proof of claim to coincide with the Debtors' 1980-1982 tax returns.

Wherefore, the debtors request the Court deny the Internal Revenue Services claim of $26, 489.57.

LAW OFFICES OF DAVID W. KIRK, P.C.

March 4, 1996
DATE

s/ *John C. Connors*
David W. Kirk/11508000
James E. Bailey/01524990
Kevin W. Wilhelm/00785252
John C. Connors/04705200
Attorney for Debtors
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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

IN RE: ROSE DAVISON, Debtor
CASE NO. 94-53421K, CHAPTER 13

FILED APR 22 1996 (Docket No. 13 - 1)
U.S. BANKRUPTCY COURT BY s/""DEPUTY

UNITED STATES' RESPONSE TO OBJECTION TO CLAIM OF IRS

The United States of America, on behalf of its agency, the Internal Revenue Service ("IRS"), responds to the Objection to the Claim of the Internal Revenue Service ("Objection") as follows:

1. The United States admits that the IRS has not amended its claim to coincide with the Debtor's amended returns for the years 1980-1982. Debtor was audited for 1980 through 1982, and at the audit, the Debtor signed a written agreement to the assessments reflected on the Internal Revenue Service's Proof of Claim. The IRS is currently reviewing these returns to determine if further adjustment is warranted.

2. With respect to paragraph II of the Objection, the United States is in the process of determining whether an amendment would be appropriate.

FOR THESE REASONS, the United States asks that the Court dismiss the objection, deny the relief requested, and grant all further relief to which the United States is entitled.

JAMES DeATLEY
UNITED STATES ATTORNEY

s/ *C E Messersmith*
Cynthia E. Messersmith
Texas State Bar No. 04199400
Attorney, Tax Division
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Maxus Energy Tower
717 N. Harwood, Suite 400
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N:\UDD\
MESSERSM\
DAVISON\
RESPONSE

ATTORNEYS FOR THE UNITED STATES

OFFICIAL I.R.S. FORM # 4549; 3-26-84

UNOFFICIAL I.R.S. FORM # 4549; 3-26-84

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Pages 139 & 140 Original Record
(United States District Court
Western District of Texas
San Antonio Division
Docket No. 14;
Objection to the Recommendation of the Magistrate Judge...
Date of Entry: Filed January 14, 1999)

Supreme Court Rule 12.7.

AFFIDAVIT: *6th* day of *June*, 1996

CERTIFICATE OF SERVICE

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Pages 141 & 142 Original Record
(United States District Court
Western District of Texas
San Antonio Division
Docket No. 14;
Objection to the Recommendation of the Magistrate Judge...
Date of Entry: Filed January 14, 1999)

Supreme Court Rule 12.7.

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

IN RE: ROSE DAVISON, Debtor
CASE NO. 94-53421K, CHAPTER 13

FILED JUN 13 1996 (Docket No. 16 - 1)
U.S. BANKRUPTCY COURT BY s/"DEPUTY

A TRUE COPY, I CERTIFY
s/ *"B=== C==="*
DEPUTY CLERK

AGREED ORDER ON DEBTOR'S
OBJECTION TO PROOF OF CLAIM

The United States of America, on behalf of the Internal Revenue Service ("Service"), and Debtor, Rose Davison, have agreed that this matter should be resolved as follows:

1. The Service will amend its proof of claim to reflect the filing of the income tax returns by Rose Davison for her 1980, 1981, and 1982 calendar years. The amendment will result in an elimination of the secured claim for taxes for those years.

2. The proof of claim as amended will reflect an unsecured priority claim of $461.61 for Debtor's 1992 income taxes and an unsecured general claim of $1,411.96 with respect to Debtor's 1988 and 1990 income taxes and the penalty (including interest thereon) relating to the unsecured priority claim.

3. The statute of limitations of 26 U.S.C. 6511(a) bars the Debtor's claims for refund for the 1980, 1981, and 1982 years.

4. Each party will bear its own costs and attorney's fees.

It is so ORDERED.

SIGNED: *June 13, 1996.*

s/ Ronald B. King
UNITED STATES BANKRUPTCY JUDGE

AGREED BY:

s/ *C E Messersmith*
CYNTHIA E. MESSERSMITH
Texas Bar No. 04199400
Attorney, Tax Division
U.S. Department of Justice
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ATTORNEY FOR UNITED STATES

s/ *John C. Connors*
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ATTORNEY FOR ROSE DAVISON

25* http://ftp.fedworld.gov/pub/irs-news/ir-97-43.txt
For Release: 11/6/97
IR-97-43

IRS TESTS STREAMLINED BANKRUPTCY APPEALS PROCESS

WASHINGTON – The Internal Revenue Service will test a new process to resolve certain tax-related disputes without litigation when taxpayers are in bankruptcy. The test begins today and will be conducted in Arizona, Indiana, Massachusetts and the Texas counties that comprise the Houston IRS District.

The Bankruptcy Appeals Process is an administrative approach that does not alter the existing jurisdiction or procedures of the Bankruptcy Court. The intent is to give debtors a fast and effective means to resolve certain tax disputes related to their bankruptcy filing. This process will be available only to debtor, not to third parties such as creditors or creditors' committees.

After the test, which may last up to one year, the IRS will evaluate the results and consider whether to extend the program nationwide. Details on the Bankruptcy Appeals Process are in Announcement 97-111, which is available now through the IRS Website at www.irs.ustreas.gov, and which will be published in Internal Revenue Bulletin 1997-47, dated November 24, 1997.

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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

DEC 5 1997

[IRS/TREASURY/SEAL]
TAXPAYER ADVOCATE

Ms. Rose Davison
8540 Michelle Way
San Antonio, TX 78239

Dear Ms. Davison:

Your letter dated October 16, 1997, concerning your 1980, 1981, 1982, and 1994 tax examinations, has been referred to my office by the Inspector General.

A member of my staff has researched your account and found that Ms. Sandra McCutcheon of the South Texas District Taxpayer Advocate's office has been working with you on this matter. Ms. McCutcheon informed us that your returns have been processed and that all liens have been released. She further stated that once the Bankruptcy Court releases jurisdiction of your returns, the overpayments from those returns will be applied against outstanding tax liabilities. However, only those refunds that are open under statute guidelines will be refunded to you once the tax liabilities have been resolved.

In light of the above, this office is closing your case because the South Texas District Taxpayer Advocate's office is continuing to work on your case. If you have any further questions, please contact our office at (202) 622-4300. We apologize for any delay in our response.

Sincerely,

s/ "Lee R. Monks (?)"
Lee R. Monks

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INTERNAL REVENUE SERVICE

Department of the Treasury

District Director

300 E. 8th St., Austin, Texas 78701

Date: **JUN 23 1998**

Mr. Riley Sean Davison
6435 David Dr.
San Antonio, Texas 78239

Dear Mr. Davison,

This is in response to your inquiry on behalf of your mother, Rose M. Davison, dated September 24, 1997, addressed to Senator William Roth. I am sorry for the concern this matter has caused you.

I regret that we cannot furnish you with any information regarding your mother's income tax account. The laws on disclosure are very strict. The Privacy Act requires that you furnish a power of attorney in order to obtain any information about another taxpayer's account. If you have further questions, you may contact Sandra McCutcheon, a member of my Problem Resolution Staff, at 300 E. 8th St., Stop 1006AUS, Austin, Texas 78701, telephone number (512) 499-5457 (not toll-free).

I apologize for the delay in responding to you.

Sincerely,

s/ *"Tom George"*
for Pam C. Bigelow
District Director

FOR RELEASE: 1/12/99 IR-1999-06 *28

IRS HAS NEW FORM AND PUBLICATION FOR INNOCENT SPOUSE RELIEF

WASHINGTON – The Internal Revenue Service has new versions of its form and publication for innocent spouse relief, each revised to incorporate the changes made by last summer's IRS Restructuring and Reform Act.

"This is the latest of several steps we've taken in our ongoing effort to help innocent spouses," said IRS Commissioner Charles O. Rossotti. "We hope that our materials will effectively explain the new law to taxpayers and assist them in taking full advantage of their rights. We appreciate the comments we received on the draft form last fall and welcome suggestions on how we might further improve these items. We plan to incorporate additional feedback from taxpayers and practitioners – as well as our own experience in processing these requests- into even better products."

The Act set a deadline of January 19, 1999, for the IRS to make a form available for taxpayers to request relief under the new law.

Last month, the IRS issued interim guidelines for giving equitable relief consideration, one of the law's new provisions. The IRS automatically extended this consideration to all requests it handled after the new law took effect in July, without further action on the requester's part. The IRS continues to suspend collection actions against anyone who asks for innocent spouse relief until the request is acted upon.

When a married couple files a tax return jointly, each spouse is fully liable for any taxes owed, including any additional assessments that may result after an audit. The law offers relief to a spouse who did not know about erroneous items that caused the extra tax, to a divorced or separated person to the extent an additional tax is allocable to the other spouse, or to a person who does not qualify under these provisions, but who it would be inequitable to hold responsible for the taxes owed.

Details on the new provisions are in the free IRS Publication 971, "Innocent Spouse Relief." Taxpayers should use the revised Form 8857, "Request for Innocent Spouse Relief," when seeking any of the three new types of relief. Both items are available on the IRS Web site at www.irs.ustreas.gov, and by calling 1-800-

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TAX-FORM.

Taxpayers may send comments or suggestions for improving these materials by e-mail to tfpmail@publish.no.irs.gov, by fax to 202-622-5025, or by letter to Tax Forms Coordinating Committee, IRS, OP:FS:FP, Room 5577, 1111 Constitution Ave., NW, Washington, DC, 20224.

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General Motors Corp. v. Pamela Equities Corp. (5th Cir. 97-30185) July 9, 1998

..."The question of arbitrability is to be decided by the court on the basis of the contract entered into by the parties. *Commerce park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984). A presumption of arbitrability exists requiring that whenever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. *Mar-len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635-636 (5th Cir. 1985) (citing *Warrior & Gulf*, 363 U.S. at 583). The weight of this presumption is heavy: "[A]rbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue." *Id.* at 636 (quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979)).

Rose Marie Davison, Petitioner Pro Se/Riley Davison, assist

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